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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Carlin Combustion Technology, Inc.

Serial No. 78222753

Daniel G. Mackas of McCormick, Paulding & Huber LLP for
Carlin Combustion Technology, Inc.

Brian D. Brown, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney).

Before Bucher, Kuhlke and Walsh, Administrative Trademark
Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Carlin Combustion Technology, Inc. has filed an
application to register the mark EZ-TEMP (standard
character form) for "control to be mounted to a water
heater, boiler or furnace to control the operating
temperature of the appliance by cycling power to an oil or

gas burner at the appropriate time" in International Class 11.¹

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used on its identified goods, so resembles the registered mark EASY TEMP for "thermostats for controlling heating and cooling systems" in International Class 9,² as to be likely to cause confusion, mistake or deception.

When the refusal was made final, applicant appealed. Briefs have been filed, but applicant did not request an oral hearing. We affirm the refusal to register.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or

¹ Application Serial No. 78222753, filed March 7, 2003, alleging a bona fide intent to use the mark in commerce.

² Registration No. 1934213, issued November 7, 1995, Section 8 affidavit accepted, Section 15 affidavit acknowledged.

services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Similarity of the Marks

The examining attorney bases his finding that the marks are similar primarily on the identical sound of the first part of the marks EZ and EASY and the identical second part TEMP combining to create "overall phonetic equivalents." (Brief, p. 3) In response, applicant argues that the different spelling of its mark EZ creates a "distinct visual impression caused by these two letters in order to expand upon the distinct visual impression of the EZ family of marks owned by the Applicant." (Brief, p. 2) Applicant specifically references a registration for the mark EZ for oil and gas burners and argues that the "association between applicant's product line of oil and gas burners sold under the federally registered mark EZ and its product line of controllers would be destroyed if such controllers were sold under the visually distinct mark EASY TEMP." *Id.*

Examining the marks in terms of their appearance, sound, meaning, and commercial impression, we find the marks to be similar. The test of likelihood of confusion

is not whether the marks can be distinguished when subjected to a side-by-side comparison. The question is whether the marks create the same overall impression. *Visual Information Inst., Inc. v. Vicon Indus. Inc.*, 209 USPQ 179 (TTAB 1980).

Although the marks have a somewhat different appearance in view of the different spelling of easy, we agree that the marks sound the same. *RE/MAX of America, Inc. v. Realty Mart, Inc.*, 207 USPQ 960 (TTAB 1980). The different spellings for EZ and EASY, and the hyphen in applicant's mark do not affect the identity of the spoken marks. Moreover, EZ is the well-recognized abbreviation for easy, thus, the marks have the same meaning and connotation in relation to the respective goods. Finally, the different spelling in applicant's and registrant's marks, does not create a different commercial impression or distinguish the marks. In view thereof, we agree that the marks are similar overall.

With regard to applicant's argument concerning the EZ registration, we note that it is not supported by a copy of the registration. Trademark Rule 2.142(d); *In re Posthuma*, 45 USPQ2d 2011, 2012 n. 2 (TTAB 1998). However, inasmuch as the examining attorney did not object and addressed applicant's argument based on this registration, we will

consider this argument. Applicant's possible ownership of another registration for EZ for other goods does not support registration of the current application. See *Baroid Drilling Fluids Inc. v. Sun Drilling Products*, 24 USPQ2d 1048 (TTAB 1992). The issue before us is "the likelihood of confusion of applicant's mark vis-a-vis the registrant's mark." In *re Lar Mor International, Inc.*, 221 USPQ 180, 183 (TTAB 1983). Thus, even if applicant were to demonstrate that it had established a "family" of marks characterized by the term "EZ" it would not entitle applicant to register a different mark that is confusingly similar to registrant's mark. *Baroid, supra*.

Similarity of the Goods

The examining attorney contends that the identification of registrant's goods is very broad and the application and cited registration "identify goods that serve similar functions and are used to regulate or control temperature." (Brief, p. 4) In particular, the examining attorney notes that the identification of goods in the registration is not limited to "the type of heating and cooling systems that are involved with its thermostats [and] it is presumed that the registration encompasses all goods of the type described, including those in the applicant's more specific identification, that they move in

all normal channels of trade and that they are available to all potential customers." Id.

In response, for the first time in its reply brief, applicant argues that the goods differ inasmuch as its goods "are typically situated in a basement or utility room [and]...[control] the general operation ...of the heating/cooling source...[while] Registrant's mark...is directed to thermostats that are situated remotely from a heating/cooling source in a room or space in which the temperature is to be regulated [and] [t]he purpose of such thermostats is not to control the general operation of a heating/cooling source which may be servicing several zones, but rather to regulate the temperature in the associated room or space." (Brief, p. 3) Applicant also argues that the trade channels are different because "the brand of thermostat for regulating the temperature in a room or other space is typically different from that of the brand of the heating/cooling source and controls used thereon for controlling the general operation of the heating/cooling source [therefore] thermostats and controls used with heating/cooling sources typically run in different channels of trade." Id.

It is well settled that goods need not be similar or competitive in nature to support a finding of likelihood of

confusion. The question is not whether purchasers can differentiate the goods or services themselves, but rather whether purchasers are likely to confuse the source of the goods or services. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Further, we must consider registrant's goods or services as they are described in the registration and we cannot read limitations into those goods or services. See *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). If the cited registration describes goods or services broadly, and there is no limitation as to the nature, type, channels of trade or class of purchasers, it is presumed that the registration encompasses all goods or services of the type described, that they move in all normal channels of trade, and that they are available to all classes of purchasers. See *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

Applicant's argument fails because registrant's goods, as identified in the registration, are not limited in the way applicant suggests nor is there any evidence in the record that registrant's goods are generally understood in the industry and by relevant purchasers to be so limited.

We take judicial notice of the following definition of "thermostat" from The American Heritage Dictionary of the English Language, (4th ed. 2000): "an automatic device for regulating temperature (as by controlling the supply of gas or electricity to a heating apparatus)." University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983) (Board may take judicial notice of dictionary definitions).

When we consider registrant's goods as they are described in the registration and the definition of thermostat, we find that they would include a control (thermostat) mounted to a water heater, boiler or furnace (heating and cooling systems) to control the operating temperature of the appliance by cycling power to an oil or gas burner at the appropriate time. In view thereof, and inasmuch as there are no limitations in registrant's identification of goods, we must deem registrant's thermostats to encompass controls for the operating temperature of a water heater, boiler or furnace. Accordingly, we find that the identified goods are related and overlap. In addition, inasmuch as there are no limitations in the registrant's identification of goods we

presume an overlap in trade channels and that the goods would be offered to all normal classes of purchasers.

In conclusion, in view of the highly similar marks, related goods and the same or overlapping channels of trade and purchasers, we find that applicant's mark EZ-TEMP, if used by applicant, for its identified goods is likely to cause confusion with the registered mark EASY TEMP for thermostats for controlling heating and cooling systems.

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.